Maharin Nisha bte Hassan Mohamed v Panir Selvam a/l Chellamuthu & Anor

HIGH COURT (SEREMBAN) — ORIGINATING SUMMONS NO 24–623 OF 2001
LOW HOP BING J
12 SEPTEMBER 2005

Civil Procedure — Judgment — Setting aside — Application — Whether by way of summons in chambers — Whether application to set aside could be made in an entirely different proceeding — Delay in application, whether must be explained — Whether judgment was illegal or lacked jurisdiction — Whether court should invoke inherent powers to set aside — Rules of the High Court 1980 O 13 r 8 & O 42 r 13 — Courts of Judicature Act 1964 s 67

The plaintiff vide Seremban High Court Civil Action No 22–96 of 1999 had obtained judgment in default of defendants' appearance. The subject matter, a piece of land was subsequently transferred to the plaintiff. On 13 May 2002, Hashim J made a final order in terms against the defendants and granted the plaintiff order of vacant possession of the land under O 89 of the Rules of the High Court 1980. The defendants claimed all three judgments were obtained by the plaintiff as a result of deception and fraud and the defendants applied by way of summons in chambers to set aside those judgments.

It was contended for the plaintiff that under O 13 r 8 and O 42 r 13, the time limited for applying to set aside a judgment in default is 30 days from the date of receiving the judgment or order and that the application must be filed in Seremban High Court Civil Action No 22–96 of 1999 and not in this originating summons.

The plaintiff took the view that as the order made by Hashim J was a final order, the defendants should have instead appealed. The plaintiff asked the court not to invoke the inherent powers of the court where rules contain provisions making available sufficient remedies.

Held, dismissing the defendants' application with costs:

(1) The defendants' claim for damages based on allegations of deception and fraud could hardly be resolved by way of summons in chambers which was supported by mere affidavits. Order 18 r 8(1) contains matters which must be specifically pleaded and one such matter is fraud. It means that the resolution of the issue of fraud by way of summons in chambers was eminently unsuitable (see para 18).

(2) Order 13 r 8 empowers the court to set aside or vary any judgment entered in pursuance of O 13. However, the defendants must under O42 r 3 do so within 30 days after the receipt of the order or judgment by them. The defendants in this case had sought to set aside the aforesaid

three judgments now after they were granted to the plaintiff some three to five years ago. The absence of an averment in the defendants' affidavit as to the reason for such undue and inordinate delay was obviously fatal to the defendants' application (see para 21). Further, the defendants' application to set aside a judgment in default given by the learned judge in Civil Action No 22–96 of 1999 must be made in the proceedings where the judgment or order had been made, and not by way of a lateral application in an entirely different proceeding altogether, as in this summons in chambers (see para 22).

(3) On the basis of the defendants' mere affidavits, the court was unable to arrive at a finding that this case came within the exception, ie illegality or lack of jurisdiction to be set aside. In the circumstances, the defendants should have lodged an appeal, but had chosen not to do so (see para 27).

(4) Although O 92 r 4 appears to be wide in scope, it is not a carte blanche. There must be a proper basis for it to be invoked. Where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers (see para 30); *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 followed. In the instant application, apart from O 13 r 8 and O 42 r 13, s 67 of the Courts of Judicature Act 1964, confers upon the defendants the right to invoke the jurisdiction of the Court of Appeal by preferring an appeal against any of the three judgments or orders of the High Court. There were therefore sufficient remedies under the Rules of the High Court 1980 and the Courts of Judicature Act 1964 for the defendants to pursue if the defendants were mindful of these remedies and had acted timeously (see para 31).

[**Bahasa Malaysia summary**

Plaintif melalui Tindakan Sivil Mahkamah Tinggi Seremban No 22–96 tahun 1999 telah memperolehi penghakiman ingkar kehadiran defendan-defendan. Perkara subjek, iaitu sebidang tanah kemudiannya telah dipindahmilik kepada plaintif. Pada 13 Mei 2002, Hashim H telah memberi perintah seperti dipohon akhir terhadap defendan-defendan dan memberi perintah kepada plaintif bagi milikan kosong tanah tersebut di bawah A 89 Kaedah-kaedah Mahkamah Tinggi 1980. Defendan mendakwa bahawa ketiga-tiga penghakiman diperolehi melalui penipuan dan fraud dan defendan telah memohon secara saman dalam kamar untuk mengetepikan penghakiman tersebut.

Plaintif menyatakan bahawa di bawah A 13 k 8 dan A 42 k 13, had masa bagi memohon untuk mengetepikan sesuatu penghakiman ingkar adalah 30 hari daripada tarikh penerimaan penghukuman atau perintah dan permohonan tersebut perlu difailkan di Mahkamah Tinggi Seremban Tindakan Sivil No 22–96 tahun 1999 dan bukannya dalam saman pemula ini.

Plaintif berpendapat bahawa memandangkan perintah yang dibuat oleh Hashim J adalah perintah akhir, defendan-defendan sepatutnya merayu. Plaintif memohon mahkamah untuk tidak menggunakan kuasa sedia ada mahkamah di mana kaedah mengandungi peruntukan yang memberi remedi yang mencukupi.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Tuntutan defendan bagi gantirugi berdasarkan dakwaan penipuan dan fraud tidak boleh diselesaikan hanya dengan melalui cara saman dalam kamar yang disokong afidavit. Aturan 18 k 8(1) mengandungi perkara-perkara yang perlu diplidkan secara spesifik dan salah satunya adalah fraud. Ini bermakna penyelesaian isu berkenaan fraud melalui saman dalam kamar adalah sangat tidak bersesuaian (lihat perenggan 18).

(2) Aturan 13 k 8 memberi kuasa kepada mahkamah untuk mengetepikan atau mengubah sebarang penghakiman yang dimasuki menurut A 13. Walau bagaimanapun, defendan di bawah A 42 k 3 berbuat demikian dalam masa 30 hari selepas penerimaan perintah atau penghakiman oleh mereka. Defendan-defendan dalam kes ini telah memohon untuk mengetepikan ketiga-tiga penghakiman sekarang setelah diberikan kepada plaintif tiga hingga lima tahun sebelumnya. Ketiadaan penyataan dalam afidavit defendan mengenai sebab bagi kelewatan yang berlebihan dan melampau secara jelasnya mematikan permohonan defendan (lihat perenggan 21). Tambahan itu, permohonan defendan untuk mengetepikan penghakiman ingkar yang diberikan oleh yang arif hakim dalam Tindakan Sivil No 22–96 tahun 1999 perlulah dibuat dalam prosiding dalam mana penghakiman atau perintah tersebut telah dibuat, dan bukanlah dengan cara permohonan sisian dalam prosiding yang berlainan, sebagaimana saman dalam kamar ini (lihat perenggan 22).

(3) Hanya dengan berdasarkan afidavit defendan-defendan, mahkamah tidak boleh mencapai satu keputusan bahawa kes ini adalah kes berkecuali, iaitu untuk mengetepikan kepenyalahan undang-undang atau kekurangan bidang kuasa diketepikan. Dalam keadaan ini, defendan sepatutnya membuat rayuan, tetapi telah memilih untuk tidak berbuat begitu (lihat perenggan 27).

(4) Walaupun A 92 k 4 kelihatan seperti mempunyai skop yang luas, ia bukanlah satu carte blanche. Perlu ada asas yang betul untuk menggunakannya. Dimana kaedah-kaedah memperuntukkan remedi secukupnya, mahkamah tidak akan menggunakan kuasa sedia adanya (lihat perenggan 30); *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 diikut. Dalam permohonan ini, selain daripada A13 k 8 dan A 42 k 13, s 67 Akta Mahkamah Kehakiman 1964 memberi defendan hak untuk menggunakan bidang kuasa Mahkamah Rayuan dengan memilih untuk merayu terhadap tiga penghakiman atau perintah Mahkamah Tinggi. Oleh itu terdapat remedi yang mencukupi

di bawah Kaedah-kaedah Mahkamah Tinggi 1980 dan Akta Mahkamah Kehakiman 1964 bagi defendan untuk meneruskan sekiranya defendan menyedari adanya remedi-remedi ini dan bertindak pada masanya (lihat perenggan 31).]

Notes

For cases on setting aside of judgment, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 171–235.

Cases referred to

Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v WT Low & Ng Realty Sdn Bhd [2003] MLJU 1 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178 (folld)

Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 67

Rules of the High Court 1980 O 13 r 8, O 18 r 8(1), O 42 r 13, O 89, O 92 r 4

Christina Edwin Jacob (Zailan & Co) for the plaintiff.
Uma Parvathy Thothathri (Uma & Associates) for the defendants.

Low Hop Bing J:

APPLICATION

[1] This application provides an illustration of the importance of having a fundamental knowledge of the relevant procedural and substantive laws in civil litigation in order to enable an advocate and solicitor to enhance his or her competence as a learned member of the Bar.

[2] Enclosure 15 is the defendants' application by way of summons in chambers under O 92 r 4 of the Rules of the High Court 1980 (RHC) for the following orders:

(1) Leave be granted to the defendants to make this application;

(2) All proceedings be stayed until the hearing and determination of this application;

(3) The judgments of Muhamad Ideres J given on 17 January 2000; of Hashim J (now JCA) given on 13 May 2002; and of Azhar J given on 22May 2003 be set aside;

(4) The sale and purchase agreement dated 11 November 1998 be declared null and void;

(5) The land administrator concerned be ordered to cancel the transfer of the property to the plaintiff;

(6) Damages amounting to RM1,000,000; and

(7) Costs.

[3] The defendants' application is based on deception and fraud allegedly perpetrated on them by the plaintiff.

[4] All references hereinafter to an order and a rule are references to that order and rule in the RHC 1980 unless the context otherwise requires.

FACTUAL BACKGROUND

[5] The defendants have filed two affidavits in support, from which I shall narrate the averment of facts in essence for the purposes of providing a definitive decision in respect of this application.

[6] The defendants were the former co-owners of land held under HS(D) 60178, Lot No 18944 in the Mukim of Rantau, District of Seremban ('the land').

[7] In 1998, the defendants were in dire financial straits and had approached one Ibrahim, the plaintiff's husband, to ease the defendants' predicament. They have on 11 November 1998 entered into a sale and purchase agreement ('SPA') with the plaintiff who as purchaser has paid RM10,000 to the defendants as vendors. The defendants were represented by Messrs Zailan & Co a firm of solicitors ('Zailan & Co').

[8] The defendants claimed that they could not understand English and the contents of the SPA in English were not interpreted to them.

[9] The defendants' execution of the SPA was witnessed by one Tang Jay Soon whom the defendants claimed was not known to them, adding that the column to fill in the name of their solicitors had been left blank.

[10] The completion date for the SPA was on or before 11 March 1999 and the redemption sum was to be paid to the chargee, Malaysia Building Society Bhd, from the balance of the purchase price.

[11] On 16 January 1999, pursuant to the SPA, the plaintiff had entered a private caveat against the land.

[12] The plaintiff had on 7 July 1999 received a copy of the SPA from Zailan & Co.

[13] On 17 January 2000 vide Seremban High Court Civil Action No 22–96 of 1999, the plaintiff had obtained judgment in default of defendants' appearance.

[14] On 29 May 2000, the land was transferred to the plaintiff.

[15] On 13 May 2002, Hashim J (now JCA) made a final order in terms against the defendants in encl 1 which was the originating summons filed by the plaintiff for an order of vacant possession of the land under O 89.

FRAUD AND DAMAGES

[16] Defendants' learned counsel Miss Uma Parvathy Thothathri had filed thick volumes of written submissions, the gist of which is to the effect that all the three judgments had been obtained by the plaintiff as a result of deception and fraud and the defendants are entitled to the prayers sought in this summons in chambers.

[17] Miss Christina Edwin Jacob, plaintiff's learned counsel, contended that the defendants' allegation of deception and fraud has never been raised before and has now been raised as an afterthought.

[18] In my view, the defendants' claim for damages based on allegations of deception and fraud can hardly be resolved by way of summons in chambers which is supported by mere affidavits. Order 18 r 8(1) contains matters which must be specifically pleaded and one such matter is fraud. It means that the resolution of the issue of fraud by way of summons in chambers is eminently unsuitable. Obviously, a writ action is the proper mode of commencement of proceedings so that the parties may adduce viva voce evidence in support or in rebuttal. The parties must also be accorded the opportunity to embark upon a careful cross-examination and re-examination in order to assist the court in evaluating the evidence with a view to arriving at a well-considered finding of facts.

SETTING ASIDE JUDGMENTS

[19] It was contended for the plaintiff that under O 13 r 8 and O 42 r 13, the time limited for applying to set aside a judgment in default is 30 days from the date of receiving the judgment or order and that the application must be filed in Seremban High Court Civil Action No 22–96 of 1999 and not in this originating summons, being different proceedings. *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 FC was cited in support.

[20] I am unable to find any submission of substance for the defendants on this issue.

[21] In my judgment, it is clear that O 13 r 8 empowers the court to set aside or vary any judgment entered in pursuance of O 13. However, there is the issue of undue and inordinate delay. Even if the defendants had relied on O13 r 8 and filed the necessary applications in order to persuade the court to exercise the discretion to set aside the aforesaid three judgments, the defendants must under O 42 r 3 do so within 30 days after the receipt of the order or judgment by them. However, the defendants have sought to set aside

the aforesaid three judgments now when those judgments were granted to the plaintiff some three to five years ago. The absence of an averment in the defendants' affidavit as to the reason for such undue and inordinate delay is obviously fatal to the defendants' application.

[22] Further, the defendants' application to set aside a judgment in default given by the learned judge on 17 January 2002 in Civil Action No 22–96 of 1999 must be made in the proceedings where the judgment or order has been made, and not by way of a lateral application in an entirely different proceeding altogether, as in this summons in chambers.

[23] In *Badiaddin*, one of the judgments of the Federal Court was delivered by Peh Swee Chin FCJ (as he then was) who at pp 417–418 held, inter alia, as follows:

> It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its validity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding.

PROCEDURE FOR APPEAL

[24] The plaintiff took the view that as the order made by Hashim J (now JCA) is a final order, the defendants should have appealed, referring to *Badiaddin*; and *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 (CA).

[25] There was no response of any merit from the defendants' counsel.

[26] As the order made in favour of the plaintiff on 13 May 2002 is a final judgment under O 89, it is instructive to revisit the Federal Court judgment in *Badiaddin*, Mohd Azmi FCJ (as he then was) held at 409A-D as follows:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

This was followed by the Court of Appeal in *Tenaga Nasional Bhd*, (per Gopal Sri Ram JCA at pp 561g–562b).

[27] On the basis of the defendants' mere affidavits, I am unable to arrive at a finding that this case comes within the exception ie illegality or lack of jurisdiction enunciated in the judgment of Mohd Azmi FCJ above. In the circumstances, the defendants should have lodged an appeal, but has chosen not to do so.

ORDER 92 RULE 4

[28] The plaintiff asked the court not to invoke the inherent powers of the court where rules contain provisions making available sufficient remedies, on the basis of *Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v WT Low & Ng Realty Sdn Bhd* [2003] MLJU 1 (HC).

[29] The defendants relied on O 92 r 4 which reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[30] In my view, although O 92 r 4 appears to be wide in scope, it is not a carte blanche. There must be a proper basis for it to be invoked. It has been so succinctly stated by Syed Agil Barakbah SCJ in *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers. (See also *Affin Bank*, per Abdul Malik Ishak J, at pp 424–425).

[31] In the instant application, apart from O 13 r 8 and O 42 r 13, s 67 of the Courts of Judicature Act 1964 confers upon the defendants the right to invoke the jurisdiction of the Court of Appeal by preferring an appeal against any of the three judgments or orders of the High Court. There are therefore sufficient remedies under the Rules of the High Court 1980 and the Courts of Judicature Act 1964 for the defendants to pursue if the defendants were mindful of these remedies and had acted timeously.

CONCLUSION

[32] On the foregoing grounds, I hold that the defendants' application is wholly without merits and is hereby dismissed with costs.

Defendant's application dismissed with costs.

Reported by Loo Lai Mee